Supreme Court, U.S.
FILED

001523 APR - 3 2001

OFFICE OF THE CLERK

No. 00-

IN THE

Supreme Court of the United States

JAMES C. BABER, III,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

BRUCE S. ROGOW*
BEVERLY A. POHL
BRUCE S. ROGOW, P.A.
Attorneys for Petitioner
Broward Financial Centre
Suite 1930
500 East Broward Blvd.
Fort Lauderdale, FL 33394
(954) 767-8909

* *Counsel of Record*

QUESTIONS PRESENTED

I.

Is the business records exception to the hearsay rule a "firmly rooted" exception allowing a hospital report of a laboratory test to be admitted as a business record to prove an essential element of a crime without any opportunity for confrontation?

II.

Do the Confrontation Clause and the Due Process Clause guarantee that a defendant have a meaningful opportunity to test the trustworthiness of a report of a medical laboratory test before the report is admitted under the business records exception to the hearsay rule?

TABLE OF CONTENTS

Page

Questions presented i
Table of authorities iv
Opinions below 1
Statement of jurisdiction 1
Constitutional provisions involved 1
Statement of the case 2
Reasons for granting the writ 6

I. The decision below presents an important but unanswered question regarding the guarantees of the Confrontation and Due Process Clauses as applied to medical laboratory reports admitted under the business records hearsay exception 6

II. Conflict between the Florida and Mississippi Supreme Courts on the Confrontation Clause implications of the admission of laboratory reports under the business records exception warrants certiorari review by this Court 10

Conclusion 12

Contents

Page

Appendix:

A. August 31, 2000 [revised] opinion of the Supreme Court of Florida 1a

B. June 23, 1999 opinion of the Fourth District Court of Appeal of Florida 14a

C. January 4, 2001 Order of the Supreme Court of Florida denying rehearing 21a

TABLE OF AUTHORITIES

Page

Baber v. State, 775 So. 2d 258 (Fla. 2001) 1
Baber v. State, 738 So. 2d 379 (Fla. 4th DCA 1999) 1
Kettle v. State, 641 So. 2d 746 (Miss. 1994) 10, 11
Lilly v. Virginia, 527 U.S. 116 (1999) 8
Ohio v. Roberts, 448 U.S. 56 (1980) 6,7

Statutes, Rules and Regulations

28 U.S.C. § 1257(a) 1
§ 90.803(6)(a), Fla. Stat. 2
Rule 59A -7.028, Fla. Admin. Code 4
Rule 11D-8.013, Fla. Admin. Code 9

OPINIONS BELOW

The revised decision of the Supreme Court of Florida is reported at *Baber v. State*, 775 So. 2d 258 (Fla. 2001). It is reproduced in the appendix at App. 1a-13a. The original August 31, 2000 decision, which differed by a single word, is not reported and not reproduced here. The decision of the Florida Fourth District Court of Appeal is reported at *Baber v. State*, 738 So. 2d 379 (Fla. 4th DCA 1999). It is reproduced in the appendix at App. 14a-20a.

STATEMENT OF JURISDICTION

The original opinion of the Supreme Court of Florida was rendered on August 31, 2000. A revised opinion was issued on January 4, 2001, when rehearing was denied. App. 21a. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment (Confrontation Clause)

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

Fourteenth Amendment (Due Process Clause)

> Section 1. . . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Petitioner James Baber was convicted of DUI (driving under the influence of alcohol) manslaughter and DUI causing personal injuries. In the early evening, he was observed driving erratically, and made a left turn onto a divided street, heading west into an eastbound lane of traffic. He struck an oncoming vehicle, killing the driver and injuring the passenger.

Petitioner was taken to a hospital for treatment of his injuries, and there his blood was collected and the serum was tested for the presence of alcohol using a DuPont ACA IV clinical analyzer, a standard hospital testing instrument. The test result was reported to be 274 mg/dl, which at trial was mathematically converted to a whole blood alcohol level of .23 to .25 g/dl. The criminal charge required the State to prove a blood alcohol concentration in excess of .20 g/dl. No blood sample remained for forensic testing, or for petitioner to have independently tested.

The hospital blood alcohol report was introduced *via* a records custodian, under the business records hearsay

exception, section 90.803(6), Florida Statutes (1995), which provides in relevant part:

> (6) RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY -
>
> (a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association profession, occupation, and calling of every kind, whether or not conducted for profit.

In addition to the records custodian, who had no knowledge of the test, the State offered testimony of the hospital chemistry laboratory supervisor, who testified generally about the procedures leading to such a report, but who also had no personal knowledge of petitioner's test. The laboratory technician who had performed the test and the original test result contained on a tape printout produced by the DuPont ACA IV analyzer were not available. The technician

could not be found, and the tape printout was lost.[1] Over a defense Confrontation Clause objection, the business record report of the test result was admitted.[2] In response to defense counsel's arguments, the trial judge said, "If you are correct, and I don't admit the report, the case is over."

---

[1] Failing to retain the instrument printout violated the Florida Agency for Health Care Administration Regulations governing clinical laboratories, Section 59A -7.028 (Patient Test Management), which provides in relevant part:

> (4) **Test records**. The laboratory must maintain a record system to ensure reliable identification of patient specimens as they are processed and tested *to assure that accurate test results are reported*. Records shall be retained in their original form or stored on microfilm, microfiche or other photographic record, magnetic tapes or other media in an electronic data processing system. These records must identify the personnel performing the testing procedure. *Records of patient testing, including, if applicable, instrument printouts, must be retained for at least two years*. (emphasis supplied).

[2] The federal issue was raised and preserved. Petitioner raised the Confrontation Clause as an objection to the admission of the hospital report in a pretrial written Motion in Limine to Exclude Blood Test Results. R2-229, 234. The constitutional claim was argued to the trial court prior to the admission of the report. R7-587-589 ("It also does deprive us – deprives us of a right to confrontation of the witness because in this case it's very significant, it's their entire case. That one slip of paper is their entire case and I don't get to cross-examine that witness about how it was made."); R7-633-634. The Confrontation Clause was also raised in the District Court of Appeal (Initial Brief, pp. ii, iii, 10, 14, 17, 33, 35, 36) and in the Supreme Court of Florida (Initial Brief, pp. 14, 21-23). The courts below addressed and rejected petitioner's constitutional argument. App. 4a-10a; 19a.

With the admission of the hospital blood alcohol report as a business record hearsay exception, the trial continued. Petitioner was convicted and sentenced to fifteen years imprisonment. The conviction was affirmed by the Florida Fourth District Court of Appeal, but that court certified a question of great public importance to the Supreme Court of Florida. The certified question was whether state law, allowing the introduction of medical blood alcohol results under the business records exception in civil cases, applied in criminal cases, when the records are offered as proof to establish an element of the offense. App. 1a.

The Supreme Court of Florida granted discretionary review, answered the certified question in the affirmative, and approved the district court's decision. The Supreme Court of Florida discussed the Confrontation Clause issues at length, canvassing federal and state law, and concluded that business records enjoy such a presumption of reliability that the Confrontation Clause is not offended by the use of the business records exception against a criminal defendant, generally. However, the court cautioned:

> We emphasize, however, that *defendants must be given a full and fair opportunity to contest the trustworthiness of such records before they are submitted into evidence.*

App. 12a-13a (emphasis supplied).

Despite that admonition, the court did not address the fact that petitioner had no such opportunity to test the

trustworthiness of the hospital business record, or to attempt to rebut its presumption of reliability, because the technician was unavailable and the original DuPont instrument printout result had not been maintained according to law. Petitioner sought rehearing on that basis, but rehearing was denied. App. 21a.[3]

Certiorari review is sought because of the substantial Confrontation Clause and Due Process implications of the decision below.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW PRESENTS AN IMPORTANT BUT UNANSWERED QUESTION REGARDING THE GUARANTEES OF THE CONFRONTATION AND DUE PROCESS CLAUSES AS APPLIED TO MEDICAL LABORATORY REPORTS ADMITTED UNDER THE BUSINESS RECORDS HEARSAY EXCEPTION

In *Ohio v. Roberts*, 448 U.S. 56, 64 (1980), the Court said that "the absence of proper confrontation at trial `calls into question the ultimate "integrity of the fact-finding process."'" (citations omitted). Exceptions to the Confrontation Clause are carefully circumscribed: "the Clause countenances only hearsay

---

[3] The revised opinion, issued with the denial of rehearing, corrected an apparent mistake in the original opinion, which had stated in its concluding paragraph that "defendants must be given a full and fair opportunity to contest the *relevancy* of such records . . . ." (emphasis supplied). In the revised opinion "trustworthiness" was substituted for "relevancy." App. 12a-13a.

marked with such trustworthiness that `there is no material departure from the reason of the general rule.'" *Id.* at 65 (citations omitted). The Court wrote:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.

Id., at 66.

This Court has not held that business records generally, or hospital records that are non-original reports of medical laboratory tests, fall within a "firmly rooted" exception to the rule against the admission of hearsay. The closest the Court has come in the business records context is a footnote to a sentence saying "that certain hearsay exceptions rest upon such solid foundations that virtually any evidence within them comports with the substance of the constitutional protection." *Ohio v. Roberts*, 448 U.S. at 66. The footnote said: "*See, e.g.* . . . Comment, 30 La. L. Rev. 651, 668 (1970) ("Properly administered the business and public records exceptions seem to be among the safest of the hearsay exceptions." 448 U.S. at 66.

Thus, the important but yet unanswered questions are whether the business records exception is so "firmly rooted"

that such records may be admitted without adherence to the Confrontation Clause; whether hospital reports of medical laboratory tests fall within that "firmly rooted" exception; and, if so, whether "properly administered" means that a defendant must have a meaningful opportunity to test the trustworthiness of the record. Answering the questions would provide the opportunity to examine "the current connection between the Confrontation Clause and the hearsay rule," a "link" that a member of the Court has said may be a "question open for another day." *Lilly v. Virginia*, 527 U.S. 116, 142-143 (1999) (Breyer, J., concurring).

While many courts have held business records, including hospital business records, to be a "firmly rooted" hearsay exception,[4] none of them has held that in a criminal case a hospital business record of a laboratory report is admissible even if the defendant has no meaningful opportunity to test the trustworthiness of the record. Here, there was no blood for the defendant to test, the actual test result was lost, *and* the technician who performed the test, saw the original result, and made the computer data entry, could not be found. Thus, even if a hospital business record could be viewed as trustworthy enough to be presumptively admissible, only the Florida Supreme Court has held that the Confrontation Clause permits the admission of business records to establish the essential element of a crime in a case in which there is *no way*

---

[4] *See, e.g.*, the cases cited by the court below (App. 8a-10a).

to confront and test the reliability of the non-original hospital record.[5]

The Supreme Court of Florida's revision of its original opinion, saying that "defendants must be given a full and fair opportunity to contest the trustworthiness of such records before they are submitted into evidence" (App. 12a-13a), pays lip service to the Confrontation and Due Process Clauses, but underscores the constitutional violations in this case because the instrument printout and the technician were lost, and there was no blood to retest.

Certiorari should be granted to resolve whether non-original reports of hospital test results are subject to the protections of the Confrontation Clause and the Due Process Clause, or whether they fall within a "firmly rooted" hearsay exception, which would permit their admission into evidence even if there is no meaningful method to challenge their accuracy.

---

[5] The absence of the instrument printout was particularly prejudicial. A state crime lab expert in this case admitted that when blood alcohol is measured in a forensic laboratory the original gas chromatography charts are maintained, and would be available for comparison with the final reported results. Petitioner did not have that opportunity. None of the procedural safeguards utilized by forensic laboratories (*i.e.*, duplicate testing, testing of standards prior to each test, retention of the original test results) (*see* § 11D-8.013, Fla. Admin. Code) were present in this case. Indeed, DuPont does not recommend its ACA-IV analyzer for forensic blood alcohol determinations.

II. CONFLICT BETWEEN THE FLORIDA AND MISSISSIPPI SUPREME COURTS ON THE CONFRONTATION CLAUSE IMPLICATIONS OF THE ADMISSION OF LABORATORY REPORTS UNDER THE BUSINESS RECORDS EXCEPTION WARRANTS CERTIORARI REVIEW BY THIS COURT

The Supreme Court of Florida has now held that the admission of laboratory test reports under the business records exception to establish an element of a crime (without the original test result or the testimony of the person who performed the test), does not violate a criminal defendant's rights under the Confrontation Clause. App. 12a-13a. The court below expressly acknowledged that the Mississippi Supreme Court has come to the opposite conclusion in *Kettle v. State*, 641 So. 2d 746 (Miss. 1994), but "disagree[d] with *Kettle* to the extent it is contrary to the majority view. . . ." App. 10a-12a.

Kettle v. State, which involved cocaine tests performed in a state crime laboratory, held that a mere custodian of records can "introduce the records in his care and custody, [but] he cannot satisfy the right to confront witnesses *when properly invoked*." 641 So. 2d at 749 (emphasis supplied).

> Under Rule 803(6), therefore, a custodian of the records of the Mississippi Crime Lab may introduce laboratory reports, *except where the defendant objects on the ground that his Sixth*

> *Amendment right to confront the person who prepared the test is being violated.*

Kettle, 641 So. 2d at 750 (emphasis supplied).

The Mississippi Supreme Court acknowledged that "[w]hen the Sixth Amendment right to confrontation arises, the ultimate question is whether hearsay evidence offered qualifies under a `firmly rooted hearsay exception.' *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 2539, 65 L.Ed.2d 597, 608 (1980). *See also Bourjaily v. U.S.*, 483 U.S. 171, 182, 107 S. Ct. 2775, 2782-83, 97 L.Ed.2d 144, 157 (1987)." *Kettle*, 461 So. 2d at 750. But the Mississippi Supreme Court, unlike the Florida Supreme Court, refused to admit a laboratory test against a defendant without giving the defendant an opportunity to test the trustworthiness of the business record.

This Court should grant review to resolve the conflict between Florida and Mississippi. Resolution of that conflict will establish the contours of the Confrontation Clause nationwide in the context of this important area – the admission of the unconfronted report of scientific or laboratory test results as a bare business record to establish the essential element of a crime.

If the Florida approach prevails, forensic laboratory testing in DUI cases could become passé. Why would a state use the careful forensic test methodologies designed to insure accurate and reviewable blood alcohol results, when a simple hospital business record, without more, is admissible and insulated from confrontation and cross-examination?

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

* BRUCE S. ROGOW
BEVERLY A. POHL
BRUCE S. ROGOW, P.A.
Broward Financial Centre
Suite 1930
500 East Broward Boulevard
Fort Lauderdale, Florida 33394
(954) 767-8909

* Counsel of Record

April 2001

APPENDIX A — REVISED OPINION OF THE SUPREME COURT OF FLORIDA DATED AUGUST 31, 2000

SUPREME COURT OF FLORIDA

No. SC96010

JAMES C. BABER, III,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

[August 31, 2000]
REVISED OPINION

SHAW, J.

We have for review a decision on the following question certified to be of great public importance:

> DOES *LOVE V. GARCIA*, 634 So. 2d 158 (Fla. 1994) APPLY IN CRIMINAL PROSECUTIONS WHERE BLOOD ALCOHOL TEST RESULTS ARE OFFERED AS PROOF TO ESTABLISH AN ELEMENT OF THE OFFENSE, IF THE BLOOD ALCOHOL TESTS WERE ADMINISTERED BY HOSPITAL PERSONNEL FOR MEDICAL TREATMENT PURPOSES?

Appendix A

Baber v. State, 738 So. 2d 379, 382 (Fla. 4th DCA 1999). We have jurisdiction. *See* art. V, § 3(b)(4), Fla. Const. We answer the certified question affirmatively and approve the district court's decision.

The State charged and the jury convicted petitioner of DUI manslaughter. The dispositive facts are as follows:

> In the early evening of November 11, 1995, [petitioner] was observed driving erratically in a northerly direction on Military Trail in Palm Beach County. He then turned left to go west, but went into the east bound lane of 45th Street. He struck an oncoming vehicle, killing the driver and injuring the passenger.
>
> [Petitioner], who was seriously injured, was taken to St. Mary's Hospital in West Palm Beach where his blood was tested for alcohol content on the hospital's DuPont ACA IV clinical analyzer. [Petitioner] represents in his brief, and the parties agreed at oral argument, that this was done for purposes of medical treatment. This test, which uses blood serum, reflected a blood alcohol level of .274 at the time of the accident. The blood serum test result was then converted to a whole blood result reflecting a blood alcohol level of from .23 to .25.
>
> . . . .

Appendix A

> In order to introduce the blood alcohol report, the state called the hospital's medical records custodian who laid the necessary foundation under the business record hearsay exception, section 90.803(6)(a), Florida Statutes (1995). The state also called the head of the chemistry department of the hospital who controlled the laboratory. He testified that he had copied [petitioner]'s blood test results from the computer system, described the manner in which the report was prepared, and described how the machine, which the hospital had been using since 1991, determines blood alcohol levels based on blood serum testing. He also explained the daily and weekly maintenance performed on the machine according to the manufacturer's instructions.

Baber v. State, 738 So. 2d 379, 380 (Fla. 4th DCA 1999). Petitioner objected to the submission of the record absent testimony from the laboratory technician who performed the test and chain of custody testimony. *See id.*

On appeal, petitioner raised, among other things, the issue of the admission of the disputed record under *Love v. Garcia*, 634 So. 2d 158 (Fla. 1994). The district court observed:

> In *Love*[,] . . . the Florida Supreme Court held in a personal injury case that a blood alcohol test report contained in a hospital record was admissible with no testimony other than that of the business record custodian of the hospital

> qualifying the report as a business record. The court reasoned that if such a report is sufficiently trustworthy to be relied on for medical treatment, it is sufficiently trustworthy to be admissible in evidence as a business record, unless the party opposing the admission can show that it is untrustworthy.

Id. at 380-81. Based on the foregoing, the court concluded that this Court's decision in *Love* applies in criminal cases and, therefore, the report was properly admitted as a business record through the testimony of the hospital's records custodian. *See id.* at 382. We agree.

The right of a defendant to confront his or her accusers is a basic constitutional right protected by both the United States and Florida constitutions.[1] The United States Supreme Court has explained:

> The primary object of the [Confrontation Clause] was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of

---

1. *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted by the witnesses against him . . . ."); art. I, § 16(a), Fla. Const. (providing that an "accused . . . shall have the right . . . to confront at trial adverse witnesses . . . .").

> compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-43 (1895).

The exercise of a defendant's right to confront his or her accusers also implicates the defendant's right to due process since confronting one's accusers is essential to a fair trial. *See Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). A defendant's right to notice "and an opportunity to be heard in his defense — a right to his day in court — are basic in our system of jurisprudence; and these rights include . . . [the] right to examine the witnesses against him." *In re Oliver*, 333 U.S. 257, 273 (1948), *cited in Chambers*, 410 U.S. at 294.[2]

Federal and Florida courts have recognized, however, that the right to confront one's accusers is not absolute. The Supreme Court has stated that exceptions to the Confrontation Clause are "not . . . static, but may be enlarged from time to time if there is no material departure from the reason of the general rule." *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934), *overruled on other grounds*, *Malloy v. Hogan*, 378 U.S. 1 (1964). This Court has said that hearsay may be admissible in a criminal trial where the testimony is

---

2. *See* U.S. Const. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."); art. I, § 9, Fla. Const. ("No person shall be deprived of life, liberty or property without due process of law . . . .").

such that "adversarial testing would add little to its reliability." *Conner v. State*, 748 So. 2d 950, 956 (Fla. 1999) (quoting *Idaho v. Wright*, 497 U.S. 805, 821 (1990)).

The statute establishing the admissibility of business records as an exception to the hearsay rule provides, in pertinent part:

> (6) RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY. —
>
> (a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances show lack of trustworthiness.

§ 90.803(6)(a), Fla. Stat. (1995). This Court has held that medical records are properly admitted under this exception as long as the evidence satisfies the requirements contained in the subsection. *See Love*, 634 So. 2d at 160. This Court further explained:

> Once this predicate is laid, the burden is on the party opposing the introduction to prove the

> untrustworthiness of the records. If the opposing party is unable to carry this burden, then the record will be allowed into evidence as a business record. . . .
>
> Under the business record exception, the trustworthiness of medical records is presumed. *Phillips v. Ficarra*, 618 So. 2d 312, 313 (Fla. 4th DCA 1993). Such trustworthiness is based on the test's general acceptance in the medical field and the fact that the test in question is relied upon in the scientific discipline involved. *Andres v. Gilberti*, 592 So. 2d 1250, 1252 (Fla. 4th DCA 1992). Actual reliance on the test in each course of treatment is not required.

Love, 634 So. 2d at 160.

The Fourth District's application of *Love* to criminal cases is supported by federal precedent and the majority of states.[3] The United States Supreme Court has held that if hearsay is admitted under an exception "firmly rooted" in our jurisprudence, then the "[r]eliability can be inferred without more" and the prosecutor need not prove the unavailability of the declarant. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). To that end, the Court stated that "business and public records exceptions would seem to be among the

---

3. With respect to federal precedent, it should be noted that section 90.803(6) is based on Federal Rule of Evidence 803(6). *See Love v. Garcia*, 611 So. 2d 1270, 1280 (Fla. 4th DCA 1992) (Warner, J., dissenting), *quashed on other grounds*, 634 So. 2d 158 (Fla. 1994); *Davis v. State*, 562 So. 2d 431, 433 n.1 (Fla. 1st DCA 1990).

safest of the hearsay exceptions." *Id.* at 66 n.8 (quoting J. Broocks Greer, III, Comment, *Hearsay, the Confrontation Guarantee and Related Problems*, 30 La. L. Rev. 651, 668 (1970)); *see White v. Illinois*, 502 U.S. 346, 356-57 (1992); *Bourjaily v. United States*, 483 U.S. 171, 183 (1987). Federal circuit courts of appeal have held that hospital drug tests may be admitted under the business records exception in criminal cases and that application of the exception in this circumstance does not violate the Confrontation Clause. *See United States v. Garnett*, 122 F.3d 1016, 1018-19 (11th Cir. 1997) (affirming district court's decision to admit drug test results under the business records exception); *United States v. Norton*, 867 F.2d 1354, 1364 (11th Cir. 1989) (holding that business records are admissible in criminal cases under Federal Rule of Evidence 803(6) based on *Bourjaily* and *Roberts*); *United States v. Baker*, 855 F.2d 1353, 1359 (8th Cir. 1988) ("When made on a routine basis, laboratory analyses of controlled substances are admissible as business records under Federal Rule of Evidence 803(6).").[4]

The majority rule among state courts is that drug or alcohol tests performed in the usual course of business of a

---

4. Federal courts have noted the practical reality that cross-examination of technicians who perform these tests is unlikely to yield meaningful information since the tests are routine and repeatedly performed, such that it is unlikely that a technician would specifically remember the performance of one among many identical tests performed months (if not years) before trial. *See Reardon v. Manson*, 806 F.2d 39, 41-42 (2d Cir. 1986); *United States v. Bell*, 785 F.2d 640, 643 (8th Cir. 1986) (stating that producing the technicians who perform such tests "rarely leads to any admissions helpful to the party challenging the evidence").

hospital are admissible in criminal cases under the business records exception. *See, e.g., Kreck v. Spalding*, 721 F.2d 1229, 1245-46 (9th Cir. 1983) (upholding admission of drug test as business record in murder case under Washington law); *State v. Russo*, 485 A.2d 1335, 1339-40 (Conn. Ct. App. 1985) (holding that trial court properly admitted hospital records under hospital/business record exception absent testimony from the physician who conducted the test, and thus defendant's confrontation right was not violated); *McLean v. State*, 482 A.2d 101, 104-05 (Del. 1984); *Dixon v. State*, 489 S.E.2d 532, 535, 537 (Ga. Ct. App. 1997); *State v. Garlick*, 545 A.2d 27, 35 (Md. 1988); *State v. Todd*, 935 S.W.2d 55, 60-61 (Mo. Ct. App. 1996). As the Maryland Court of Appeals stated:

> The blood sample was not taken for the purpose of litigation. The testing was performed in the hospital and not by a police laboratory. And there were no discrepancies apparent on the face of the record. Thus no extensive foundation needs to be laid before this hospital report is admissible under the business record exception. . . .
>
> . . . Many hospital tests and procedures are performed routinely and their results are relied upon to make life and death decisions. The examining doctor relied on these objective scientific findings for Garlick's treatment and never doubted their trustworthiness. Neither do we. This high degree of reliability, as we explained early on, permits introduction of the test results contained in the hospital records presented

> in this case without any need for showing unavailability of the technician and without producing the technician. Under these circumstances the constitutional right of confrontation is not offended.

Garlick, 545 A.2d at 34-35 (citations and footnotes omitted).[5]

Amicus Curiae Florida Association of Criminal Defense Lawyers cites to only one state with a directly contrary view-

---

5. Quoting an earlier case, the Maryland court further observed:

> It is difficult to conceive why this record should not be reliable. There is no motive for the person whose duty it is to make the entries, to do other than record them correctly and accurately. On the other hand, there is the strongest reason why he should: *First*, because of the great responsibility, he knowing that the treatment of the patient depends largely upon this record, and, if it be incorrect it may result, and probably will result, in the patient's failure to receive proper surgical or medical treatment, which failure might be followed by serious consequence or even death. *Second*, the entrant must realize and appreciate that his position is dependent upon the accuracy with which the record is made. *Third*, as was stated by Tindall, C. J., in *Poole v. Dicas*, 1 Bing. [(N.C.) 649, 653, 131 Eng. Rep. 1267, 1269 (1835)]: "It is easier to state what is true than what is false; the process of invention implies trouble, in such a case unnecessarily incurred."

Garlick, 545 A.2d at 31 (emphasis added) (quoting *Globe Indem. Co. v. Reinhart*, 137 A. 43, 46 (Md. 1927)).

Mississippi. *See Kettle v. State*, 641 So. 2d 746 (Miss. 1994). In *Kettle*, the Mississippi Supreme Court expressed its view thusly:

> An evidentiary rule can rise no higher in meeting constitutional standards than an evidentiary statute. While it is true that a custodian under the rule could introduce the records in his care and custody, he cannot satisfy the right to confront witnesses when properly invoked:
>
> > The subdivision only gives authenticity to the certificate being used as substantive evidence of the facts stated therein. To be used as the evidence of these facts without the accompanying testimony of the analyst who prepared the certificate, constitutional requirements must be met. This means there must be a pre-trial agreement by the defendant with the prosecuting attorney consenting to such and waiving the right to confront and cross-examine that witness.

Id. at 749-50 (quoting *Barnette v. State*, 481 So. 2d 788, 791-92 (Miss. 1985)).

The *Kettle* court relied, in part, on *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977). The court's reliance on *Oates*, however, is misplaced because there the Second Circuit held that a drug test performed by law enforcement officials could

not be admitted in a criminal trial as a public record since the report was made pursuant to an investigation against the accused. *See id.* at 84 (relying on Federal Rule of Evidence 803(8)(C), which prohibited admission of public records regarding "factual findings resulting from investigations made pursuant to authority granted by law"). In contrast, the alcohol test result being admitted in the instant case was performed by a hospital, which did not have an interest in the outcome of the future criminal case lodged against the defendant. Thus, we disagree with *Kettle* to the extent it is contrary to the majority view and, to the extent it relies on *Oates*, we find it distinguishable from the instant case.

Finally, petitioner argues that *Love* should not be applied in criminal cases based on *State v. Strong*, 504 So. 2d 758 (Fla. 1987), wherein we held that "the state or the defendant may have . . . blood test evidence admitted [in a criminal case pursuant to] establishing the traditional predicates for admissibility, including test reliability, the technician's qualifications, and the test results' meaning." *Id.* at 760. We find that petitioner's reliance on *Strong* is unavailing because it preceded our decision in *Love*; therefore, *Love* is controlling in the instant case.

Based on federal and state precedent, this Court holds that a hospital record of a blood test made for medical purposes, which is maintained by the hospital as a medical or business record, may be admitted in criminal cases pursuant to the business record exception to the hearsay rule. We emphasize, however, that defendants must be given a full and fair opportunity to contest the trustworthiness of

such records before they are submitted into evidence. Thus, the certified question is answered in the affirmative and the decision below is approved.

It is so ordered.[6]

WELLS, C.J., and HARDING, ANSTEAD and QUINCE, JJ., concur.

PARIENTE and LEWIS, JJ., concur in result only.

---

6. We decline to address the additional issues raised by petitioner since they are outside the scope of the certified question and the decision below.

APPENDIX B — OPINION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOR THE FOURTH DISTRICT DATED AND FILED JUNE 23, 1999

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

JANUARY TERM 1999

CASE NO. 98-1531

JAMES C. BABER, III,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Opinion filed June 23, 1999

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Edward A. Garrison, Judge; L.T. Case No. 95-12337 CFA02.

* * *

KLEIN, J.

Appellant was convicted of DUI manslaughter and DUI with personal injury. He asserts that the trial court erred in allowing into evidence a blood alcohol report prepared for

medical purposes at the hospital where he was treated for injuries after the accident. More specifically, he argues that the court should not have allowed the report in as a business record of the hospital, where the technician who performed the test did not testify. He recognizes that the report would have been admissible as a business record in a civil case under *Love v. Garcia*, 634 So. 2d 158 (Fla. 1994), but argues that *Love* does not apply in criminal cases. We disagree and affirm.

In the early evening of November 11, 1995, appellant was observed driving erratically in a northerly direction on Military Trail in Palm Beach County. He then turned left to go west, but went into the east bound lane of 45th Street. He struck an oncoming vehicle, killing the driver and injuring the passenger.

Appellant, who was seriously injured, was taken to St. Mary's Hospital in West Palm Beach where his blood was tested for alcohol content on the hospital's DuPont ACA IV clinical analyzer. Appellant represents in his brief, and the parties agreed at oral argument, that this was done for purposes of medical treatment. This test, which uses blood serum, reflected a blood alcohol level of .274 at the time of the accident. The blood serum test result was then converted to a whole blood result reflecting a blood alcohol level of from .23 to .25.

In the trial court, appellant attacked the admission into evidence of the blood alcohol report as a business record on two grounds. He contended that the court should have conducted a *Frye*[1] hearing in regard to the testing machine

1. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

and that the report was not admissible as a business record of the hospital. Although appellant raised the *Frye* issue in his brief, he conceded that it was without merit at oral argument, and we need not address it.

In order to introduce the blood alcohol report, the state called the hospital's medical records custodian who laid the necessary foundation under the business record hearsay exception, section 90.803(6)(a), Florida Statutes (1995). The state also called the head of the chemistry department of the hospital who controlled the laboratory. He testified that he had copied appellant's blood test results from the computer system, described the manner in which the report was prepared, and described how the machine, which the hospital had been using since 1991, determines blood alcohol levels based on blood serum testing. He also explained the daily and weekly maintenance performed on the machine according to the manufacturer's instructions.

The state also presented the testimony of the chief of forensic toxicology at the Palm Beach County Sheriff's Office, who testified as to the accuracy of the testing machine used in this case. He had reviewed the hospital's testing procedures and results, and rendered an opinion that tests made during the period of time when this test was made were reliable.

Appellant objected that the report was inadmissible without the testimony of the laboratory technician who administered the blood test and chain of custody testimony, but the trial court overruled the objection.

In *Love v. Garcia*, 634 So. 2d 158 (Fla. 1994), the Florida Supreme Court held in a personal injury case that a blood

alcohol test report contained in a hospital record was admissible with no testimony other than that of the business record custodian of the hospital qualifying the report as a business record. The court reasoned that if such a report is sufficiently trustworthy to be relied on for medical treatment, it is sufficiently trustworthy to be admissible in evidence as a business record, unless the party opposing the admission can show that it is untrustworthy.[2]

Appellant argues that *Love* applies only in civil cases, relying on earlier DUI cases such as *State v. Strong*, 504 So. 2d 758, 760 (Fla. 1987), which held that blood test evidence may be "admitted on establishing the traditional predicates for admissibility, including test reliability, the technician's qualifications, and the test results' meaning," citing *State v. Bender*, 382 So. 2d 697 (Fla. 1980).

In *Robertson v. State*, 604 So. 2d 783 (Fla. 1992), our supreme court was asked to answer the certified question of whether the test results of blood samples taken at the request of law enforcement are admissible where the requirements of section 316.1933, Florida Statutes are not met. If a blood alcohol test is taken pursuant to the statute, there is a presumption of impairment if the blood alcohol content is .10 or more. The court held that blood alcohol reports are admissible even though they do not comply with the statute, but under those circumstances the statutory presumption would not exist. The court noted that a predicate would have to be laid for admission of the blood alcohol test as set forth in *Bender*.

---

2. *Love* also held that a different blood alcohol test run by an independent laboratory was also admissible into evidence as a business record through the testimony of the records custodian of the laboratory.

Appendix B

The above DUI cases all predated *Love*, which recognized confusion surrounding the issue. 634 So. 2d at 159. After *Love* came *Brock v. State*, 676 So. 2d 991 (Fla. 1st DCA 1996), which held that *Love* applied in a criminal case. In *Brock* the issue was whether the defendant could get the blood alcohol test report in as a business record, not whether the state could.

Before *Love*, in *Davis v. State*, 562 So. 2d 431 (Fla. 1st DCA 1990), the first district held that a laboratory report from an independent laboratory showing cocaine in urine was admissible as a business record of the laboratory in a probation revocation proceeding.[3] Noting that the business records rule contained in the Federal Rules of Evidence, rule 803(6), is similar to section 90.803(6), Florida Statutes, the court relied on federal court decisions allowing laboratory reports identifying controlled substances to be admitted into evidence in criminal cases as business records. *United States v. Baker*, 855 F.2d 1353 (8th Cir. 1988); *United States v. Scholle*, 553 F.2d 1109 (8th Cir. 1988); *Sherman v. Scott*, 62 F.3d 136 (5th Cir. 1995); *United States v. Garnett*, 122 F.3d 1016 (11th Cir. 1997). As one federal court observed, it is highly unlikely that the person who performed the test would have any independent recollection of it. *Reardon v. Manson*, 806 F.2d 39, 41-42 (2d Cir. 1986).

---

3. In *Williams v. State*, 24 Fla. L. Weekly D1267 (Fla. 5th DCA May 28, 1999) the fifth district affirmed a conviction based on a Florida Department of Law Enforcement Laboratory report, admitted through a records custodian, showing that a substance defendant sold was cocaine. The court relied on *Davis*. It appears that the only issue preserved was whether the report had been qualified as a business record, and that the issue involved in this case, whether the laboratory report is admissible in lieu of live testimony, was not preserved.

Appendix B

The trend in other states is to admit blood alcohol tests into evidence in criminal cases as business records. *Dickson v. State*, 489 S.E.2d 532 (Ga. App. 1997); *State v. Todd*, 935 S.W.2d 55 (Mo. Ct. App. 1996); *State v. Yates*, 574 So. 2d 566 (La. Ct. App. 1991); *State v. Christian*, 895 P.2d 676 (N.M. Ct. App. 1995); *State v. Garlick*, 545 A.2d 27 (Md. 1988); *State v. Martorelli*, 346 A.2d 618 (N.J. App. Div. 1975).

Appellant argues that the admission of the report under the business records exception to the hearsay rule, in a criminal case, violates the Confrontation Clause of the United States Constitution. That argument has been rejected by the federal courts. *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 2538 n.8 (1980); *United States v. Norton*, 867 F.2d 1354, 1363 (11th Cir. 1989).

Nor do we agree with the appellant that our decision in *State v. Sclafani*, 704 So. 2d 128 (Fla. 4th DCA 1997) is applicable. In *Sclafani* we stated in dicta that blood taken for medical purposes was admissible in a DUI manslaughter case where the "traditional predicate" of *Strong* is laid. It does not appear from our opinion in *Sclafani*, however, that the issue of whether the blood alcohol report was admissible as a business record was raised or considered.

We conclude that the supreme court's decision in *Love* does apply in criminal cases, and that the trial court properly admitted the blood alcohol report as a business record through the testimony of the hospital medical records custodian. Although we are reasonably confident that our holding is a logical application of *Love*, we believe it would be best for the Florida Supreme Court to determine whether

we are correct, because of the possible impact of our decision on the manner in which DUI cases are tried throughout the state. We say "possible," because county courts, where most of these cases are tried as misdemeanors, may be applying *Love*, but we have no way of knowing. We therefore certify the following question as one of great public importance: [4]

> DOES *LOVE V. GARCIA*, 634 SO. 2D 158 (FLA. 1994) APPLY IN CRIMINAL PROSECUTIONS WHERE BLOOD ALCOHOL TEST RESULTS ARE OFFERED AS PROOF TO ESTABLISH AN ELEMENT OF THE OFFENSE, IF THE BLOOD ALCOHOL TESTS WERE ADMINISTERED BY HOSPITAL PERSONNEL FOR MEDICAL TREATMENT PURPOSES?

We have considered the other issues raised by appellant, and find them to be without merit. We therefore affirm.

TAYLOR, J., and WHITE, ALICE BLACKWELL, Associate Judge, concur.

---

4. If our supreme court answers this question in the affirmative, the distinction made by *Strong*, acknowledged in *Robertson*, between medical and legal blood may warrant reconsideration. Under *Love* the more important distinction may be whether the blood was tested by law enforcement or independently of law enforcement. Otherwise a report will be admitted as a business record where the test was done by the hospital for medical reasons, but not where the same test was done by the hospital only because law enforcement requested it.

APPENDIX C — ORDER OF THE SUPREME COURT OF FLORIDA DENYING MOTION FOR REHEARING DATED JANUARY 4, 2001

SUPREME COURT OF FLORIDA

THURSDAY, JANUARY 4, 2001

CASE NO.: SC96010

JAMES C. BABER, III

Petitioner(s)

vs.

STATE OF FLORIDA

Respondent(s)

In light of the revised opinion, the Petitioner's Motion for Rehearing is hereby denied.

WELLS, C.J., and SHAW, HARDING, ANSTEAD, PARIENTE and QUINCE, JJ., concur.

LEWIS, J., dissents.

A True Copy
Teste:

s/ Thomas D. Hall
Thomas D. Hall
Clerk, Supreme Court